U.S. Department of Labor

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MAILED: 1/26/2001

IN THE MATTER OF:	*	
	*	
Robert S. Sadosky	*	
Claimant	*	
	*	
Against	*	Case No.: 2000-LHC-0227
	*	
Navy Exchange Service Command	*	OWCP No.: 1-133522
Employer/Self-Insurer	*	
	*	
and	*	
	*	
Crawford & Company	*	
Third Party Administrator	*	

APPEARANCES:

David N. Neusner, Esq.
For the Claimant

Richard F. van Antwerp, Esq.
For the Employer/Self Insurer

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING MEDICAL BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), as extended by the provisions of the Non-Appropriated Fund Instrumentalities Act, 5 U.S.C. 8171, **et seq.**, herein referred to as the "Act." The hearing was held on June 2, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral

arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administration Law Judge, CX for a Claimant's exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 5	Attorney Embry's letter suggesting a briefing schedule	07/18/00
CX 6	Attorney Embry's letter filing	08/11/00
CX 7	Claimant's brief	08/11/00
CX 8	Attorney Embry's letter filing the following articles referred to in Claimant's brief	08/18/00
CX 9	**Musculoskeletal Disorders and Workplace Factors** A Critical Review of Epidemiolgic Evidence for Work-Related Musculoskeletal Disorders of the Neck, Upper Extremity and Low Back, published by the CDC, U.S. Department of Health and Human Services, July 1997	08/18/00
CX 10	**Ergonomics and Cumulative Trauma Disorders**, by Thomas J. Armstrong, Ph.D.	08/18/00
CX 11	**Medical Progress, Occupational Medicine**, **The New England Journal**	08/18/00

	of Medicine, March 1, 1990	
CX 12 08/18/00	**Carpal Tunnel Syndrome (CTS) and exposure to vibration, repetitive wrist movements and heavy manual work: a case-referent study. British Journal of Medicine.** 1989; 46:43-47.	
EX 4	Employer's brief	10/05/00

The record was closed on October 5, 2000 as no further documents were filed.

PROCEDURAL HISTORY

A prior hearing was held before this Administrative Law Judge on April 15, 1996 and, by **Decision and Order Awarding Benefits**, dated October 4, 1996 (CX 3), Robert S. Sadosky ("Claimant" herein) was awarded, **inter alia**, benefits for his temporary total and/or temporary partial disability from April 11, 1995 through the present and continuing, at various rates. Claimant then filed a **Motion For Modification**, pursuant to Section 22, and that motion was heard at a hearing on May 22, 1997. This Administrative Law Judge, by **Decision and Order On Modification - Awarding Benefits** (CX 4), awarded Claimant benefits for his permanent total disability from November 27, 1996 forward. The Employer was awarded the limiting provisions of Section 8(f) of the Act.

The Findings of Fact and Conclusions of Law made in my prior decisions (CX 3, CX 4) are binding upon the parties by virtue of "The Law of the Case," **Res Judicata** and Collateral Estoppel as said decisions are now final and those findings and conclusions are incorporated herein by reference and as if stated **in extenso** and I will reiterate such findings and conclusions only for purposes of clarity and to deal with this claim for medical benefits.

Summary of the Evidence

Claimant submits that his work for the Employer, in various job categories, has resulted in certain hand/arm symptoms characterized as numbness and tingling for the past several years. He continued working for the Employer until November 1, 1995, at which time he had to stop because of his work-related back injury. By August of 1996 Claimant's hands bothered him "very badly" and he had difficulty sleeping or grasping and holding onto objects because of the pain and numbness. Claimant's supervisor from January 13, 1995 through his last day of work, Hilary R. Carboni, corroborated Claimant's repetitive work activities in the Employer's vending machine department and in his use of computers to input certain data as to his sales, etc. (TR 53-70)

Claimant finally went to see Dr. Jeffrey A. Salkin, an orthopedic surgeon, and the doctor's reports will be summarized at this point to put this matter into proper perspective. (TR 22-24)

As of September 4, 1996 Dr. Salkin reported as follows (CX 1-3):

"Bob comes in complaining today of arm pain and tingling in the right hand. His hand falls asleep at night.

"His has a positive Tinel's sign, positive Phalen's test, and positive forearm compression test.

"He will let us know if it gets any worse. We will try a night splint for now. If he does call, the next step would be some nerve conduction studies."

As of October 31, 1996 Dr. Salkin reported as follows (CX 1-4):

"Bob's back condition is unchanged. He still has difficulty with activities exceeding his work capacity restrictions.

"His carpal tunnel symptoms also seem to be bothering him. He gets pain all the way up his arm now and tingling in the radial three digits.

"We will setup some nerve studies for him and see him back after those are completed."

Those tests were performed on November 22, 1996 and Dr.

Daniel E. Moalli sent the following report to Dr. Salkin (CX 2):

"Robert Sadosky is a 42 year male referred for evaluation of pain with numbness and tingling in the Median distribution of both hands. These symptoms have been present for one year, and have increased in severity.

"Median and Ulnar motor and sensory nerve conductions were performed. Proximal conductions were measured utilizing F waves. Radial SNAPs were also measured.

"IMPRESSION: Studies are consistent with a bilateral Carpal Tunnel Syndrome."

As of December 4, 1996 Dr. Salkin reported as follows (CX 1-5):

"Mr. Sadosky returns for his restrictions to be updated.

"Nerve conduction studies do show carpal tunnel syndrome.

"He is on total temporary disability until January 1st at which time he can return to work under the previously stated restrictions."

Dr. Salkin sent the following letter to Claimant's attorney on November 5, 1997 (CX 1-1):

> "I will attempt to clarify the work relatedness of Robert Sadosky's carpal tunnel syndrome. As you know, Mr. Sadosky worked at the Navy Exchange relating to me a heavy keyboard use from the period of November 1995 through November 1996.
>
> "During my September 1996 visit with Mr. Sodosky, he did complain of carpal tunnel syndrome symptoms during the period of time which he has worked at the Navy Exchange. Based on the temporal relatedness of his job and his complaints, I think it is fair to say that his problems were caused and related to his heavy keyboard use. Although his carpal tunnel syndrome may have been pre-existing, he insists that it was not symptomatic until September after having worked at the Navy Exchange since November of 1995," according to the doctor.

The Employer has referred Claimant for an evaluation by its medical expert, Dr. Arnold-Peter C. Weiss, an orthopedic surgeon, and the doctor issued the following report on January 18, 2000 (EX 1):

"HISTORY AND REVIEW: Extensive medical records were reviewed for this particular evaluation.

"Mr. Sadosky is a 46-year-old ambidextrous male who worked as a supervisor at a warehouse for the Navy. He states he worked there for approximately 15 years. He states that in 1989, 1993, 1994 and 1995 he has had multiple back injuries. This required on and off employment and light duty and full duty capacities. He states that he returned to light duty activities in November of 1995 which involved a part-time job as an office worker. He states that he worked three to four hours per day of which one to two hours was on a computer. The patient states that about a year after, he started to have significant pain in both hands. He initially tried to ignore this but eventually was seen by Dr. Salkin who diagnosed bilateral carpal tunnel syndrome. He was sent for electrodiagnostic studies in November of 1996 which were consistent with bilateral carpal tunnel syndrome. Of interest is that the note dated November 22, 1996 states the patient has had symptoms for one year of numbness and tingling in both hands. This would indicate that his symptoms began at the time he began to undertake his light duty office work activities. The patient was placed on total disability at the end of November of 1996. He noted some slight improvement in his symptoms. He has also been helped by some nonsteroidal anti-inflammatories with his symptoms. He does wear wrist wraps on both hands. He does complain of numbness and pain in both hands on a persistent basis. He has had a recommendation for carpal tunnel releases by Dr. Salkin. The patient has not had any corticosteroid injections and does not wear rigid splints.

"PHYSICAL EXAMINATION: Physical examination demonstrates full range of motion of both wrists. He does wear wrist wraps bilaterally. He does have some evidence of eczema in both hands. His Phalen's test is positive by report almost immediately. His Tinel's sign is also positive by report, mainly with pain but also with some distal radiation of symptoms. He has no abnormal sweat response or skin discoloration. There is a negative pronator compression test bilaterally. CMC grind test is negative bilaterally.

"DIAGNOSIS: Bilateral carpal tunnel syndrome.

“CAUSALITY: Based on the fact that this patient began to have numbness and tingling symptoms from the medical records in November of 1995 and at that time he was just returning to light duty activities of a very low computer entry level, I cannot to a probable degree of medical certainty causally relate the patient’s bilateral carpal tunnel syndrome to his on-the-job work activities at the Navy Exchange from November of 1995 to November of 1996. Even if the patient had worked for a full year prior to developing symptoms, it would also be unlikely based on the current medical literature for a patient to have causal relationship to the amount of keyboard activities that this patient undertook. It is just as possible that this patient developed carpal tunnel symptoms of an idiopathic nature which have developed progressively over the years and are not in specific reference to his light duty activities of November of 1995 to November of 1996 when his symptoms began. It is possible that this bilateral carpal tunnel syndrome was related to his previous work activities as a supervisor in the warehouse but it does not appear that this work was repetitive enough to make a probable correlation.

“RETURN TO WORK STATUS: Specifically with respect to the patient’s bilateral carpal tunnel syndrome, I do believe he can undertake work activities and is currently partially disabled with respect to that diagnosis. I have recommended that he wear his wrist splints at all times and not lift greater than 5-10 pounds prior to treatment.

“PROGNOSIS: Fair to good.

“DISCUSSION AND RECOMMENDATIONS: This patient does appear to have bilateral carpal tunnel syndrome. I do believe Dr. Salkin’s recommendation of sequential alternative would be a corticosteroid injection into both carpal tunnels since the symptoms and objective exam is relatively mild at this point. The main issue here is with respect to causality based on the records themselves which indicate that symptoms began in November of 1995, I cannot to a probable degree of medical certainty establish a causal relationship to his keyboard activities at that time,” according to the doctor.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though,

is applicable once claimant shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer

presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which negates the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988)

(medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The testimony of a physician that no relationship exists between an injury and a

claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral carpal tunnel syndrome, resulted from working conditions at the Employer's maritime facility. The Employer has introduced substantial evidence severing the connection between such harm and Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the record evidence.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the

employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

IN THE COURSE AND SCOPE OF EMPLOYMENT

The general rule applied by the Board is that an injury occurs in the "course of employment" if it occurs within the time and space boundaries of employment and in the course of an

activity whose purpose is related to the employment. **Wilson v. WMATA**, 16 BRBS 73 (1984); **Mulvaney v. Bethlehem Steel Corporation**, 14 BRBS 593 (1981). In contrast, "arises out of employment" refers to the cause of source of injury. **Mulvaney v. Bethlehem Steel Corporation**, 14 BRBS 593, 595 (1981).

It is not always necessary that the particular act or event which causes the injury be itself a part of the work done for the employer, or be an activity for the employer's benefit. An activity is no longer in the course of employment, however, if the employee goes so far from his employment and becomes so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that his injury arose out of and in the course of employment. **O'Leary v. Brown-Pacific-Maxon**, 340 U.S. 504, 507 (1951); **Kielczewski v. The Washington Post Company**, 8 BRBS 428, 431 (1978).

The Board has held that the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), that the claim comes within the provisions of the Act, applies to the issue of whether an injury arises in the course of employment. **Mulvaney v. Bethlehem Steel Corporation**, 14 BRBS 593 (1981)(held, administrative law judge erred in not applying presumption); **Wilson v. WMATA**, 16 BRBS 73 (1984). Employer, therefore, has the burden to produce evidence to the contrary. **Mulvaney v. Bethlehem Steel Corporation**, 14 BRBS 593 (1981); **Oliver v. Murry's Steaks**, 17 BRBS 105 (1985).

In the case at bar, the Employer submits that Claimant has not established that his bilateral carpal tunnel syndrome is a work-related injury, that the opinion of Dr. Weiss is entitled to more weight as it is well-reasoned and well-documented, especially as Dr. Salkin’s opinion is based on an inaccurate work history as to the extent of Claimant’s keyboard computer use. (EX 4)

On the other hand, Claimant submits that he has established a **prima facie** case that his bilateral carpal tunnel syndrome, the diagnosis of which is agreed to by both Dr. Salkin and Dr. Weiss, constitutes a work-related injury.

Section 7(d) of the Longshore Act provides that the Claimant shall be entitled to reimbursement for medical care if the injury requires treatment and the Employer, while aware of the injury, refuses or neglects to authorize treatment. The Employer is considered to have knowledge of an injury when it

knows of the injury and has facts which would lead a reasonable person to conclude that it might be liable for compensation and should investigate further. **Harris v. Sun Ship Building and Dry Dock**, 6 BRBS 494 (1977), **rev'd on other grounds, sub nom, Aetna Life Insurance Company v. Harris**, 578 F.2d 52 (3rd Cir. 1978). The uncontroverted evidence is that the Claimant's supervisor was made aware of Mr. Sadosky's hand problems but the Employer neglected to authorize treatment, including devices designed to minimize the Claimant's symptoms at work.

As noted, the presumption applies to the primary issue of whether the injury is causally related to employment. **Welding v. Bath Iron Works**, 13 BRBS 812 (1981); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989). Once the Claimant establishes a physical injury and working conditions which could have caused it, Section 20(a) establishes that the injury arose in the course of employment. **Lacy v. Four Corners Pipe Line**, 17 BRBS 139 (1985); **Kelaita v. Triple A Machine Shop**, 12 BRBS 326, 331 (1981).

The type of benefits sought by the Claimant is of no consequence and plays no role in limiting the applicability of Section 20(a). Certain statutory and judicial limitations to the applicability of Section 20(a) relate solely to the proof required to show entitlement to particular types of benefits (**e.g.**, Section 20(a) does not aid Claimant in trying to establish her status as a beneficiary under Section 9, **Meister v. Ranch Restaurant**, 8 BRBS 185 (1978), **aff'd mem.,** 600 F.2d 280 (D.C. Cir. 1974); Section 20(a) does not aid Claimant establishing under Section 7(d) that his physician filed requisite reports with the Secretary and Employer. **Maryland Ship Building v. Jenkins**, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), **rev'g** 6 BRBS 50 (1977)).

The Claimant's uncontradicted testimony and the reports from Dr. Salkin establish that Claimant sustained an "injury", carpal tunnel syndrome. To invoke the presumption the Claimant need only show that his work involved activities that could have caused, contributed to or aggravated his carpal tunnel syndrome. Dr. Salkin's November 5, 1997 note (CX 1) establishes the requisite **prima facie** showing of a possible work-related cause.

It is also well established in the medical literature that work activities involving repetitive and forceful use of the

hands and arms are a competent producing cause of carpal tunnel syndrome. Claimant's brief refers to and includes four pertinent articles. The NIOSH publication, **Musculoskeletal Disorders and Workplace Factors**, July 1997, ch. 5a, pp. 1-67; Wiesland, Norback, Gothen, Juhlin, "Carpal tunnel syndrome, exposure to vibration, repetitive wrist movement and heavy manual work: a case-referent study," **British Journal of Industrial Medicine**, 1989; 46:pp. 43-47; Armstrong, "Ergonomics and cumulative trauma disorders," Hand Clinics, August, 1986; Vol. 2 No. 3 pp. 553-565; Cullen, Cherniack and Rosenstock, "Occupational medicine," **New England Journal of Medicine**, March 1, 1990; Vol. 322, No. 10, p. 677. (**See** CX 9-CX 12)

In **Sinclair v. United Food & Commercial Workers**, 23 BRBS 148 (1989), a claimant with carpal tunnel syndrome made out a **prima facie** case by showing that her work involved the repetitive use of a scalpel and paper cutter. In **Hampton v. Bethlehem Steel**, 24 BRBS 141 (1990), a claimant with carpal tunnel syndrome and ulnar neuropathy met his evidentiary burden by showing that his work involved extensive overhead reaching.

Once the presumption has been invoked, the burden of proof shifts to the employer to establish that claimant's injury was not caused or aggravated by his employment. **Swinton v. J. Frank Kelley, Inc.**, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). If Claimant's work played any role in the manifestation of disease or injury then the entire resulting condition is compensable. **Bechtel Associates, P.C. v. Sweeney**, 834 F.2d 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987); **Obert v. John T. Clark & Son of Maryland**, 23 BRBS 157, 160 (1990). It is the Employer's burden on rebuttal to come forward with substantial countervailing evidence that the work injury did not cause, contribute to or accelerate the underlying condition. **Rajotte, supra.**

Employer must produce facts, not speculation, to rebut the presumption. **Steele v. Adler**, 269 F.Supp 376 (D.D.C. 1967). Highly equivocal evidence is not substantial and will not rebut the presumption. **Dewberry v. Southern Stevedoring Corp.**, 7 BRBS 322 (1977), **aff'd mem.**, 590 F.2d 331, 9 BRBS 436 (4th Cir. 1978). An opinion that is equivocal as to etiology is insufficient to rebut the presumption. **Philips v. Newport News Shipbuilding**, 22 BRBS 94 (1988).

While negative evidence may rebut Section 20(a), it must be specific and comprehensive. **Swinton, supra.** The presumption is not rebutted if the employer does not provide concrete evidence but merely suggests alternate ways that the injury might have occurred. **Delay v. Jones Washington Stevedoring Co.**, 31 BRBS 197 (1998); **Williams v. Chevron USA, Inc.**, 12 BRBS 95 (1980). If the evidence relied on to dispute causation is insufficient to rebut the presumption, causation is established as a matter of law. **Cairns v. Matson Terminals, Inc.**, 21 BRBS 252 (1988).

As noted above, the Employer's medical expert, Dr. Weiss, first states that he cannot relate the Claimant's keyboard work to the development of carpal tunnel syndrome because he had only performed at a "very low computer entry level" for a year or less. The undisputed evidence is that Claimant worked at computer and typewriter keyboards on a daily basis for the entire fourteen years of his employment with the Navy Exchange. In fact, for the period of 1989 to 1995, he spent half of his time at the typewriter or computer. (TR 37) Since the evidentiary foundation assumed by Dr. Weiss was grossly incorrect, his opinion is neither fact nor even speculation. It is simply irrelevant, and I so find and conclude.

The second point made by Dr. Weiss was that it is possible that the Claimant's carpal tunnel syndrome is idiopathic "and not in specific reference to his light duty activities of November 1995 to November 1996 when his symptoms began." This opinion, which merely means that the cause of injury might be unknown, is based on an incorrect legal standard. The fact that symptoms of an underlying disorder could have appeared at any time and at any place is irrelevant. The entire condition is compensable if work activities caused, aggravated or combined with the pre-existing condition to result in the magnification of symptoms. **Obert, supra**. Dr. Weiss failed to consider whether Mr. Sadosky's work activities contributed to the onset of symptoms.

The third point made by Dr. Weiss is that "it is possible" that Claimant's carpal tunnel syndrome was related to his "work activities as a supervisor in the warehouse but it does not appear that this work was repetitive enough to make a probable correlation." Once again, the doctor's opinion is based on an incorrect factual foundation. The uncontroverted evidence is that Claimant's work in the warehouse involved receiving large loads of snack foods and drinks. This work involved repetitive

lifting, reaching and handling of 50 to 400 cases of product at a time.

Furthermore, it appears that Dr. Weiss was unaware that Claimant's job duties from 1983 to 1995 regularly involved servicing the vending machines on the base (TR 49). On cross-examination Claimant gave a good explanation of the repetitive and forceful hand/arm activities involved in loading the machines:

> "When you're going in to fill a vending machine, and obviously we have all seen snack machines, and as I have stated these large snack machines would be completely empty. And for speed and time you would be like shuffling a deck of cards, you'd be holding maybe 10 or 12 items at once and being going through and filling the machine. I can't explain it other than that, I mean, there is a lot of dexterity with your fingers, and your wrists, and so forth. You're lifting and pulling each item. When you're filling the juice or soda machines, there is a tremendous amount of repetitive work, not only with your hand but in your arms. Because some of these machines hold 600 cans of soda, the machine would be almost empty, you would be - - each one, each single one you would have to fill." (TR 50)

Thus, it is obvious that Dr. Weiss was not provided with a full and adequate description of Claimant's job duties. The lack of a proper factual foundation led Dr. Weiss to mischaracterize the Claimant's work as "not repetitive."

Dr. Weiss concedes that repetitive work is a competent producing cause of carpal tunnel syndrome, an opinion entirely consistent with the medical literature in evidence as CX 9 - CX 12. In fact, Dr. Weiss's acknowledgment that repetitiveness is a cause of carpal tunnel syndrome is sufficient by itself to invoke and support Claimant's claim, certainly not a result anticipated by the Employer.

The opinions of Dr. Weiss are clearly based on a faulty factual foundation and therefore cannot constitute facts sufficient to defeat this claim. As the Employer has failed to meet its evidentiary burden, the Claimant has established that his carpal tunnel syndrome is work related and is entitled to medical care.

Accordingly, in view of the foregoing, I find and conclude that Claimant's work for the Employer, including his keyboard computer work, which testimony is uncontradicted in this closed record, constitutes a work-related injury. In so concluding, I have given greater weight to the well-reasoned and well-documented opinions of Dr. Salkin, Claimant's treating orthopedic surgeon. In this regard, **see Pietrunti, supra**, and **Amos, supra**.

As this claim arises within the jurisdiction of the U.S. Court of Appeals for the Second Circuit, I follow that landmark decision of the Second Circuit in **Pietrunti, supra**. (The presiding Administrative Law Judge may give more weight to the opinions of the employee's treating physician who has treated the employee over a period of time as opposed to the employer's medical expert who usually examines the employee on a one-time basis.)

Timely Notice of Injury

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty (30) days after the employee or beneficiary is aware of a relationship between the injury or death and the employment. In the case of an occupational disease which does not immediately result in disability or death, appropriate notice shall be given within one (1) year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship among the employment, the disease and the death or disability. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. **Osmundsen v. Todd Pacific Shipyard**, 755 F.2d 730, 732 and 733 (9th Cir. 1985); **see** 18 BRBS 112 (1986) (**Decision and Order on Remand**); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); **Cox v. Brady Hamilton Stevedore Company**, 18 BRBS 10 (1985); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Stark v. Lockheed Shipbuilding and Construction Co.**, 5 BRBS 186 (1976). The

relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. **Thorud v. Brady-Hamilton Stevedore Company**, 18 BRBS 232 (1986). **See also Bath Iron Works Corporation v. Galen**, 605 F.2d 583 (1st Cir. 1979); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981).

This closed record establishes that Claimant's bilateral carpal tunnel syndrome is an occupational disease and that Claimant gave timely notice of such injury to his Employer.

Statute of Limitations

Section 13(a) provides that the right to compensation for disability or death resulting from a traumatic injury is barred unless the claim is filed within one (1) year after the injury or death or, if compensation has been paid without an award, within one (1) year of the last payment of compensation. The statute of limitations begins to run only when the employee becomes aware of the relationship between his employment and his disability. An employee becomes aware of this relationship if a doctor discusses it with him. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989). The 1984 Amendments to the Act have changed the statute of limitations for a claimant with an occupational disease. Section 13(b)(2) now requires that such claimant file a claim within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship among his employment, the disease, and the death or disability. **Osmundsen v. Todd Pacific Shipyards**, 755 F.2d 730 (9th Cir. 1985), and the Board's **Decision and Order on Remand** at 18 BRBS 112 (1986); **Manders v. Alabama Dry Dock & Shipbuilding**, 23 BRBS 19 (1989). Furthermore, pertinent regulations state that, for purposes of occupational diseases, the respective notice and filing periods do not begin to run until the employee is disabled or, in the case of a retired employee, until a permanent impairment exists. **Lombardi v. General Dynamics Corp.**, 22 BRBS 323, 326 (1989); **Curit v. Bath Iron Works Corp.**, 22 BRBS 100 (1988); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); 20 C.F.R. §702.212(b) and §702.222(c).

The Benefits Review Board has discussed the pertinent elements of an occupational disease in **Gencarelle v. General Dynamics Corp.**, 22 BRBS 170 (1989), **aff'd**, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); **Fortier v. General Dynamics Corporation**, 15 BRBS 4 (1982), **appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board**, 729 F.2d 1441 (2d Cir. 1983).

As noted above, Claimant's bilateral carpal tunnel syndrome constitutes an occupational disease and he timely filed for medical benefits for such injury once the Employer refused to accept the compensability of such injury for Section 7 purposes. Moreover, a claim for medical benefits is never time-barred.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has already been found to be totally disabled and this is a claim for medical benefits only.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom.**

Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Claimant is entitled to interest on any medical expenses he has paid out of his own funds. In this regard, **see Hunt v. Director, OWCP**, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993); **Ion v. Duluth Missabe**, 31 BRBS 76 (1997); **Blazevich v. Marine Terminals Corp.**, 25 BRBS 240 (1991), **rev'd**, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228

(1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer

must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, the Employer is responsible for the reasonable and necessary expenses in the evaluation, diagnosis and treatment of Claimant’s bilateral carpal tunnel syndrome, beginning on September 4, 1996, the earliest report of Dr. Salkin (CX 1 at 3), subject to the provisions of Section 7 of the Act.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after September 27, 1999, the date of the informal conference. (CX 7) Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition should be filed within thirty (30) days of receipt of this decision and Employer’s counsel shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively verified by the District Director.

1. The Employer as a self-insurer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, **i.e.**, his bilateral carpal tunnel syndrome, commencing on September 4, 1996 (CX 1 at 3), subject to the provisions of Section 7 of the Act.

2. Interest shall be paid by the Employer on those medical expenses personally paid by the Claimant at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

3. Claimant's attorney shall file, within thirty (3) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on September 27, 1999.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl